IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 350

WILLIAM G. BARR, *Petitioner*,

v.

LINDA A. MATTEO and JOHN J. MADIGAN

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BYRON N. SCOTT
RICHARD A. MEHLER
Counsel for Respondents

September, 1958

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Respondents Linda A. Matteo and John J. Madigan, by and through their counsel, Byron N. Scott and Richard A. Mehler, oppose the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit as petitioned for by the Solicitor General on behalf of William G. Barr.

QUESTION PRESENTED

Should the Courts accord absolute immunity to suit for libel to Acting Directors of subordinate branches of Government agencies who broadcast to the newspapers false, defamatory statements of reasons for intending to suspend agency employees as soon as anticipated positions give them the power to do so?

STATEMENT

This "Opposition", for the purpose of the argument, adopts the "Statement" in the Petition, but with the following corrections:

The Office of Rent Stabilization was a branch of, and its Director was subordinate to the Administrator of, the Economic Stabilization Agency (Petitioner's Appendix, pp. 15, 21). The Press Release which is the subject matter of this suit made no reference to the "then-current Congressional inquiry" (Petition, pp. 2, 5-6). The "terminal leave plan" was "devised" by respondent Madigan who asked for and received from respondent Matteo an opinion on the advantages and disadvantages of the proposed "plan" to employees of the Office who would have been affected by it (Petitioner's Appendix, p. 20). The "plan" was "devised" as a method of keeping the agency together while Congress decided whether rent control would be extended for an additional period of time. One feature of the plan involved the use of the funds "earmarked" for terminal or accumulated annual leave payments. Employees affected by the "plan" were to be converted to reinstatement to the extent possible and necessary under the new Act, if the Act were extended, and when the appropriation had been made by Congress for its operation (R. 14-15, 17). The Thomas Amendment did not apply to the Office of Rent Stabilization when the personnel actions were taken (Sec. 1212, General Appropriations Act, 1951, 64 Stat. 768). The personnel actions were taken prior to the approval of the Act but became effective on the Monday following the Friday approval of the Act. The June 23, 1950 Act did not extend rent control to June 30, 1951 but only to December 31, 1950 (Housing and Rent Act of

1950, 64 Stat. 255). Respondent Madigan's letter to Senator Williams contained nothing that could be interpreted as a defense of the "plan". A copy of Madigan's letter to Senator Williams was read by petitioner in the early afternoon of February 3, 1950, prior to the Senator's speech on the afternoon of February 4. The District Court "refused to give instructions on the defense of truth" on the ground that defendant had offered no evidence of the truth of the defamatory publication. The Court of Appeals did not "declare" that the principle of absolute privilege "might include other officers who held comparable positions"; what they said was, "We have no present occasion to consider" that question (Petitioner's Appendix, p. 24). Petitioner was Acting Director of a subordinate branch of the Economic Stabilization Agency. His delegation of power was from the Administrator of that agency, not from the President. His functions were administrative; not "policy-making" (Petitioner's Appendix, p. 19).

REASONS FOR REFUSING THE WRIT

1. "The first decision of the Court of Appeals in this case" was vacated by this Court, 355 U.S. 171, 173. Quaere: Does the question of absolute immunity arise on the record?

2. The "Holding of the Court of Appeals" is not a "departure from the consistent pattern" set by the cases cited by Petitioner in footnote 5 on page 12 of the Petition. In those cases absolute immunity was accorded subordinate officials whose defamatory publications were contained in official reports made by them to their superiors and made within the scope of their official employment. That is not the case here. Peti-

tioner made no official report to his superior officer which could have brought such a publication within the "pattern" of those decisions but issued a press release to the newspapers as in *Colpoys* v. *Gates,* 118 F. 2d 16 (C.A.D.C.).

3. The holding does not conflict with the principles of this Court's decision in *Spalding* v. *Vilas,* 161 U.S. 483. That decision was and should remain limited by the facts to a member of the President's Cabinet. Whether or not a Cabinet member should be absolutely free from liability for malicious libel of an employee or any other person in his official capacity, it would be an "unwholesome" thing to extend this absolute immunity to such subordinate officers as Petitioner, *Howard* v. *Lyons,* 250 F. 2d 171, Cert. granted this term.

4. It seems to respondents that there is no confusion in the law on the subject. It seems clear that members of the cabinet, in their official capacities, may talk about anyone without having to answer for their motives but that lesser officials must confine their official remarks about others to their official reports to superiors or answer to the defamed for their motives.

5. It also seems to respondents that the Courts should go no further than they have already gone, *Howard* v. *Lyons, supra; Murray* v. *Brancato,* 290 N.Y. 52, 48 N.E. 2d 257; and see the concurring opinion of Chief Judge Groner in *Glass* v. *Ickes,* 73 App. D.C. 3, 117 F. 2d 273, cert. den. 311 U.S. 718. It seems absurd to say that "policy-making" officials below Cabinet rank will be hampered seriously in public discussion of the affairs of Government unless they are free to libel their employees maliciously without hav-

ing to answer for their motives. No sufficient public interest requires that such an officer be so protected. It is a dangerous thesis and "altogether subversive of the fundamental principle that no man in this country is so high that he is above the law" (Chief Judge Groner in *Glass* v. *Ickes, supra*).

6. The basic issue in the instant case is not the same as the basic issue in *Howard* v. *Lyons, supra,* in which this Court granted Certiorari this Term. In *Howard* the defendant issued no press release. He sent copies of his official report to his superior, to a select few, the Massachusetts Congressman. The basic difference between *Howard* and the instant case is the difference between 14 officially interested and informed elected officials and 130,000,000 of the uninformed general public with no sanctions to provide adequate deterrent. A reversal in *Howard* would not dispose of the instant case.

7. If, as he should have done, petitioner had suspended respondents and reported his reasons to his immediate superior, to whom the respondents could and did appeal, the case would have fallen within the pattern set by the cases cited in footnote 5 on page 12 of the petition. This would have been his duty, the customary operation. He should have done nothing else.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

BYRON N. SCOTT
RICHARD A. MEHLER
Counsel for Respondents

September, 1958